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In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BAPTIST HOSPITAL, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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The Hospital violated Section 8(a)(1) of the National Labor Relations Act by adopting and maintaining a rule that prohibits employees during non-working time from soliciting union support in all areas of the Hospital to which patients and visitors have access, without an adequate showing that such a ban was necessary to avoid disruption of patient care	14
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 576 F.2d 107. The decision and order of the National Labor Relations Board (Pet. App. 15a-28a) is reported at 223 N.L.R.B. 344.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1978. The petition for a writ of certiorari

was filed on August 8, 1978, and granted on January 8, 1979 (A. 116). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.
>
> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

QUESTION PRESENTED

Whether the respondent hospital violated Section 8(a)(1) of the National Labor Relations Act by adopting and maintaining a rule that prohibits employees from soliciting union support during nonworking time in any area of the hospital to which patients and visitors have access, without an adequate showing that such a ban was necessary to avoid disruption of patient care.

STATEMENT

A. The Board's Findings of Fact

Baptist Hospital, Inc. (hereafter "the Hospital") is a nonprofit general hospital,[1] located in Nashville, Tennessee. It has 600 patient beds and more than 1,800 employees (Pet. App. 2a, 30a; A. 24).

For a number of years prior to October 1974, the Hospital maintained a rule which prohibited solicitation on the premises without the Hospital's written approval (Pet. App. 32a-33a; A. 102).[2] In August

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[1] The National Labor Relations Act was amended, effective August 25, 1974, to extend its coverage to nonprofit health care institutions. 88 Stat. 395 (29 U.S.C. 152(14)).

[2] The rule read:

> In order to protect employees from any form of solicitation, raffle, charity drives, etc., it is strictly prohibited for anyone to solicit patients or visitors while on hospital premises without written approval of the Administration. Violation of this policy will subject employee to discipilinary action. Employees who discover persons making unauthorized solicitation should report this immediately to their Supervisor.

The rule was contained in an employee handbook, entitled "Inside Baptist Hospital," which also sets forth other rules and policies governing employee conduct. The Handbook's "Rules and Responsibilities" section urges employees "to refrain from loud talking * * * and any other activity that would be disturbing to the patient or out of place in a hospital." It also states that "[n]oise deters patient treatment and recovery * * *," that "[i]t is each employee's obligation to avoid unnecessary noise in the hospital," and that employees are to speak "in a quiet, pleasant tone * * *." In addition, the Handbook provides that an employee may be discharged for such offenses as fighting; willful violation of instructions,

1974, Local 150-T, Service Employees International Union, AFL-CIO (hereafter "the Union") began a campaign to organize the Hospital's employees, and, in October, the Hospital revised its rule restricting solicitation (Pet. App. 33a-34a, 66a; A. 3-6, 21-22).[3] This revised no-solicitation rule provides in relevant part (Pet. App. 34a, 66a-67a; A. 75):

> No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time, including work time and non-work time in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action. In those work areas of the Hospital not accessible to or utilized by the public, no solicitation of any kind, including solicitations for memberships or subscriptions will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working.

Under this rule, the Hospital prohibits all employee solicitation, including distribution of union authorization cards, at any time in any area open to patients and visitors. Included in the public-access areas closed to such solicitation are the Hospital's gift shop, cafeteria, lobbies, public restrooms, entrances, the sidewalks leading to the entrances, and the parking lot across the street from the Hospital. (Pet. App. 35a, 37a; A. 8, 9-10, 11-16, 34.)[4] Except for the emergency room entrances, the Hospital does not regard these areas as patient-care or treatment areas (Pet. App. 35a, 37a; A. 10-16, 31-32). While patients may visit these non-patient care areas—particularly the cafeteria, gift shop, and lobbies—if they are sufficiently well, they need special permission to leave their floors. (Pet. App. 35a; A. 11, 12, 13, 27, 41, 50, 54-55, 64.)[5]

The gift shop and cafeteria are open to the general public without restriction and are located on the first

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rules, or regulations; neglect of duty; loitering; leaving one's job during duty hours without permission; or "[a]ny conduct which in the opinion of administration is not suitable for a Baptist Hospital employee." (Pet. App. 64a-66a, 75a; A. 98-100, 104-105.)

[3] According to W. T. Victory, the Hospital's vice-president of personnel services, the original rule was intended primarily to keep salesmen out of the Hospital, while the new rule was designed to control the conduct of employees. The change in the rule was prompted by the Union's organizing activity on the premises (Pet. App. 33a-34a, 66a, 71a-73a; A. 5-6, 29-31). Victory stated that the change was made after consultation with the Hospital's counsel; no physicians were consulted to determine whether there was a medical basis for the revision (Pet. App. 33a-34a, 71a-72a; A. 21-22, 72-73).

[4] The record shows that there is one lobby on the 21st Avenue side of the Hospital and a smaller lobby on the other side (20th Avenue) (A. 13, 113). The Hospital's primary entrances are the emergency room entrances, the 21st Avenue entrance, and the 20th Avenue entrance. These entrances are open to both the public and the employees; there is no distinction as to who can use them. (A. 14-15, 113.) Public restrooms are scattered throughout the Hospital on various floors; they are not normally utilized by patients (A. 14).

[5] Patients may visit with their children in these areas, since young children are not permitted in patients' rooms (A. 27, 54).

floor of the Hospital's central or main building (Pet. App. 35a; A. 11-12).[6] The cafeteria, which has a seating capacity of approximately 150, is considered by the Hospital to be an area where employees and the general public may eat and relax (Pet. App. 35a; A. 11-12, 105). According to Dr. Greer Ricketson, chief of the Hospital's medical staff, "a small percentage" of patients eat in the cafeteria; special permission is required for them to do so (Pet. App. 35a; A. 64). The only employees who actually work in the cafeteria are dietary department personnel, who work in the kitchen and on the cafeteria serving line. Other employees frequent the cafeteria for meals or break periods. (Pet. App. 35a-36a; A. 12, 13, 49, 51, 71.) While three meals are served daily at specified hours on the serving line (A. 37), the cafeteria is open at all times, and food may be purchased from vending machines in an adjacent area when the serving line is closed (Pet. App. 36a; A. 37-38, 49, 51). There are other areas in the Hospital where employees may purchase food from vending machines, but the cafeteria is the only place where hot food may be pur-

[6] A layout of the Hospital's various buildings has been reproduced on page 113 of the Appendix. The Central Building, the South Building, and the East Building, to which the Ford Annex and Emergency Pavillion are attached, are the Hospital's primary patient care buildings (A. 18, 35-36). Patients are not regularly found on the first floor of these buildings, except in the admitting office, the emergency room, and the adjacent "short stay" unit, which are all located in the East Building and the adjacent Ford Annex (A. 13, 20, 28-29, 35-36).

chased by employees and others (Pet. App. 36a; A. 8, 16-17, 26, 105).[7]

Under the Hospital's revised rule, employee solicitation is permitted during nonworking time in areas closed to the public, including utility rooms, nurses' stations, and employee lounges and restrooms (Pet. App. 36a; A. 8-9, 18-19, 24-36, 63).[8] There are two employee lounges; both are equipped with food vending machines, tables, and chairs (Pet. App. 36a; A. 8, 16-17, 26). One such area, with a seating capacity of 50, is located in the Hospital's laundry building, some distance from the primary patient care build-

[7] Victory testified that the Hospital did a study of cafeteria use, at the request of its counsel, which showed that on a week day about 32 percent of the people using the cafeteria serving line during meal periods were nonemployees and that on a weekend 53 percent were nonemployees (A. 27, 36-37). Victory explained that this study was based on a count of individuals wearing employee identification pins who went through the serving line. He added that he did not know how long the study ran, that it was limited to use of the serving lines during meal periods, and that it did not include people who brought their own lunch into the cafeteria, used the vending machines, or merely sat and talked. (A. 36-38.)

[8] There are 28 utility rooms and 26 nurses' stations at the Hospital. The utility rooms are adjacent to the nurses' stations; they are used for storage of materials and sometimes contain coffee machines. (A. 17-18, 25-26.) The Hospital regards the utility rooms as both work and relief areas for the employees (A. 18). The nurses' stations, generally located on each floor of the Hospital, are shut off from the public by glass partitions. Patient records are kept at these stations and consultations between physicians and various other individuals responsible for patient care take place at these stations, which are regarded as work areas by the Hospital. (Pet. App. 36a n.3; A. 8, 18-19, 25-26.)

ings and separated from them by a thoroughfare, Patterson Street (A. 113). This lounge is not readily accessible during breaks to the employees who work in the main part of the Hospital. (Pet. App. 36a; A. 16-17, 49-50, 113.) The other employee lounge is small, with room for only 25 to 30 employees. It is located on the fourth floor surgery area of the Hospital's Central Building, and is used for the most part only as a relief area for those individuals whose duties require their presence in that area. (Pet. App. 36a-37a; A. 17, 26.)[9]

Clyde French, a part-time nursing assistant or orderly at the Hospital, was active in the Union's organizing activities. During the first three weeks of September 1974, prior to revision of the Hospital's no-solicitation rule, he distributed handbills and solicited employees to sign union authorization cards. French carried out this activity on his break periods and before and after work in such areas as the cafeteria, employee lounges, lockerrooms, and the sidewalks outside the Hospital. (Pet. App. 17a, 40a; A. 46-47, 65-66, 68-69.) French testified that he engaged in most of his union solicitation in the cafeteria because that was where most employees took their breaks and ate (A. 49-51, 71). After French began his organizational activities, the Hospital decreased the amount of work offered to him (Pet. App. 41a-54a, 19a-20a), and on January 30, 1975, ejected him from the cafeteria where he was conversing with a fellow employee, ostensibly because he was not on duty (Pet. App. 62a-63a).

[9] The Hospital also has a parking lot located across the street from the main entrance on 20th Avenue. This parking lot is open to the general public as well as employees, and Victory originally testified that solicitation was prohibited in the parking lot because of its use by the public. (Pet. App. 35a, 37a; A. 15-16.) However, Victory later testified that employee solicitation would be permitted in the parking lot as long as there was no litter or nuisance problem (A. 34). The Hospital's medical witnesses stated that such activity in the parking lot would not be detrimental to patient care (A. 45, 63).

B. The Board's Decision

The Board, adopting the findings of its administrative law judge, concluded that the revised no-solicitation rule violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), to the extent that it "prohibits employees from soliciting for the Union during their nonwork time in areas of the hospital other than immediate patient care areas" (Pet. App. 22a).[10] In so doing, the Board followed its decision in *St. John's Hospital and School of Nursing, Inc.*, 222 N.L.R.B. 1150 (1976) (Pet. App. 16a n.2). It there held that,

[10] The Board also upheld the administrative law judge's finding that the Hospital violated Section 8(a)(3) and (1) of the Act by reprimanding French and refusing work assignments to him because of his union activities (Pet. App. 16a-20a, 23a, 89a, 85a, 81a). Moreover, the Board, in disagreement with the administrative law judge, found that the Hospital further violated Section 8(a)(1) of the Act by ejecting French from the cafeteria (Pet. App. 16a, 88a). The court of appeals sustained the Board's findings concerning discriminatory treatment of French except to the extent that they were predicated on the finding that the no-solictation rule was invalid (Pet. App. 11a-12a). No issue as to the findings respecting French is raised here.

while a hospital may lawfully ban employee solicitation, even during nonworking time, in immediate patient care areas such as the patients' rooms, operating rooms, and places where patients receive treatment, a ban on that activity in other areas to which patients and visitors have access is invalid, absent a showing by the hospital that such a ban is necessary to avoid disruption of patient care.[11] The Board found that the Hospital had not made that showing here.

Specifically, the administrative law judge noted that the Hospital's two medical experts, in response to "the hypothetical question * * * whether a discussion concerning a union could affect a patient in a deleterious manner," answered that, "if the discussion were to become volatile or hostile in any form, the discussion could definitely have the potential for adversely affecting the patient and the patient's family" (Pet. App. 68a). But there was no evidence that the union activity of the Hospital's employees was of such a nature. Moreover, the administrative law judge concluded (Pet. App. 75a, footnote omitted):

> [T]here are other sections of the Respondent's "Employee Handbook," which would, or could, be utilized by the Respondent to discipline an employee engaged in union solicitation who does not otherwise conform to the rules of employee conduct. Thus, there exist, without the necessity to prohibit all union solicitation anywhere on the Respondent's premises on nonwork time, rules which prohibit unruly conduct by any employee, including one engaging in otherwise lawful union solicitation.

[11] Literature distribution may be banned in all working areas. See *Stoddard-Quick Mfg. Co.*, 138 N.L.R.B. 615 (1962).

The Board ordered the Hospital to rescind its revised no-solicitation rule and to cease and desist from promulgating, maintaining in effect, enforcing, or applying any rule "prohibiting its employees from soliciting on behalf of any labor organization during their nonworking time in any area of [the Hospital] other than immediate patient care areas" (Pet. App. 23a-24a, 90a).

C. The Court of Appeals Decision

The court of appeals denied enforcement of the Board's order respecting the no-solicitation rule. The court found that the testimony of the two physicians and the hospital administrator as to the necessity of creating and maintaining a tranquil atmosphere throughout the hospital for patients and visitors was sufficient to establish "special circumstances" that warranted the Hospital's proscription of employee solicitation in all areas accessible to patients and visitors, including the Hospital cafeteria (Pet. App. 7a-8a, 10a).[12]

[12] However, the court held that a ban on solicitation in the parking lot was not justified (Pet. App. 10a-11a):

> Both medical witnesses stated that person-to-person solicitation and distribution of literature in the parking lot should have no detrimental effect on patients within the hospital. Vice-President Victory agreed that solicitation and distribution in the parking lot would not be objectionable so long as the premises were not littered and

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Beth Israel Hospital* v. *NLRB*, No. 77-152 (June 22, 1978), slip op. 23, this Court held "that the Board's general approach of requiring health-care facilities to permit employee solicitation and distribution during nonworking time in nonworking areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health care operations or disturbance of patients, is consistent with the Act." The Court added that, in order to justify a rule prohibiting such activity in those areas, the institution must present "evidence of a substantial threat of harm to patients" (slip op. 15). The Court went on to find that the Board had reasonably applied that principle in concluding that the hospital there had violated the Act by barring employee solicitation and distribution in a hospital cafeteria used primarily by employees, but also by patients and visitors.

The Court pointed out that "patient use of the cafeteria, is voluntary, random, and infrequent" (slip op. 17);[18] that "[p]atients who frequent the cafeteria would not expect to receive special attention or pri-

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solicitation did not "create a nuisance." Other rules not in issue here provide the means for preventing noisy mass meetings and littering of the premises. Accordingly, in denying enforcement of the Board's order we construe the hospital's no-solicitation, no-distribution rule to apply only to areas within the various buildings occupied by the hospital and those exterior areas immediately adjacent to entrances used by patients and the public.

[18] The Court noted that "only 1.56% of the cafeteria's patrons are patients" (slip op. 18).

mary care there and any unusually sensitive to seeing union literature distributed or overhearing discussions about unionism, readily could avoid the cafeteria without interfering with the hospital's program of care"; and that the hospital had earlier permitted "limited union solicitation in the cafeteria for a significant period, apparently without untoward effects" (slip op. 18). The Court also noted that the hospital had "permitted use of the cafeteria for other types of solicitation, including fund drives," thereby indicating that it not only "regarded the cafeteria as sufficiently commodious to admit solicitation and distribution without disruption" (slip op. 18-19, footnote omitted), but also recognized that "the cafeteria is a natural gathering place for employees on nonworking time" (slip op. 5).

While the present case involves other patient access areas as well as the hospital cafeteria, under the principles enunciated in *Beth Israel* the Board's finding that the Hospital violated Section 8(a)(1) of the Act by barring employee solicitation in all such areas should be sustained. The Hospital's broad ban closes to employee solicitation areas which, like the cafeteria in *Beth Israel*, are not devoted essentially to patient care, and where the likelihood of disrupting such care is remote. The Hospital did not sustain its burden of establishing that such a broad ban on employee solicitation was nonetheless necessary to maintain proper patient care.

ARGUMENT

THE HOSPITAL VIOLATED SECTION 8(a)(1) OF THE NATIONAL LABOR RELATIONS ACT BY ADOPTING AND MAINTAINING A RULE THAT PROHIBITS EMPLOYEES DURING NON-WORKING TIME FROM SOLICITING UNION SUPPORT IN ALL AREAS OF THE HOSPITAL TO WHICH PATIENTS AND VISITORS HAVE ACCESS, WITHOUT AN ADEQUATE SHOWING THAT SUCH A BAN WAS NECESSARY TO AVOID DISRUPTION OF PATIENT CARE

A. The Hospital's No-Solicitation Rule Is Too Broad

The Hospital's rule bars employee solicitation, not only in areas that are devoted primarily to patient care, such as patient's rooms, operating rooms, and x-ray and therapy facilities, but also in such public areas accessible to patients and visitors as its cafeteria, gift shop, public restrooms, lobbies, entrances, and sidewalks. The latter areas the Hospital, itself, does not consider to be patient care or work areas,[14] and the likelihood that employee solicitation therein would disrupt patient care or treatment is remote.

Since these areas are open to the public generally, patients who frequent them are likely to be exposed to conduct and conversations "at least as disquieting to [them] as union solicitation * * *." *Beth Israel Hospital* v. *NLRB*, No. 77-152 (June 22, 1978), slip op. 18 n.20. Moreover, patient use of these public areas is voluntary and random. As in *Beth Israel*,

[14] Hospital Vice-President Victory testified that the cafeteria, gift shop, lobbies, entrances (other than the emergency room entrance) and sidewalks were not "work areas," which he defined as areas where patients receive care or treatment (A. 10-11, 12-13).

patients frequenting these areas reasonably expect that routine daily discourse will occur there, and any patients unusually sensitive to union organizational activities can avoid such areas without affecting their hospital treatment (slip op. 18).[15] Finally, since patients may visit these areas only with special permission (A. 54, 64), those whose well-being requires the absence of distracting or possibly upsetting stimuli would presumably not be permitted to go there.

B. The Hospital Did Not Demonstrate Special Circumstances Justifying Its Broad No-Solicitation Rule

The Hospital sought to sustain its burden of establishing that a ban on employee solicitation in all

[15] The Hospital contends that its cafeteria is distinguishable from that in *Beth Israel*, since "there is no evidence in the instant record suggesting that as few as 1.56% of the cafeteria's patrons are patients while only an additional 9% are visitors" (Br. in Opp. 5). However, while the Court's opinion in *Beth Israel* did deem it of "critical significance that only 1.56% of the cafeteria's patrons are patients" (slip op. 17-18), the legal standards enunciated in that decision are not narrowly statistical, and certainly are not limited to hospital cafeterias with no more than precisely that percentage of patient usage (slip op. 23). Employee usage of the cafeteria here was substantially similar to that in *Beth Israel*. There, 77% of the cafeteria's patrons were employees (slip op. 5), whereas here the employee usage during meal service was 68% on weekdays and 47% on weekends (A. 27, 36-37).

Nor can *Beth Israel* be distinguished on the ground that "there was no comparable evidence in this case suggesting that the Hospital's cafeteria constitutes the normal 'gathering area' for the Hospital's employees" (Br. in Opp. 5). Vice-President Victory admitted that the cafeteria is considered an area where employees and the general public may eat and relax (Pet. App. 36a; A. 12).

public areas of the hospital was justified by presenting the testimony of two members of its medical staff, Drs. Birmingham and Ricketson.[16] Dr. Birmingham testified that it was important to shield patients from emotional problems because the attitude of a patient and the patient's family have "a great deal to do with the recovery" of the patient (A. 39-40). He further stated that the need to maintain a tranquil atmosphere is not limited to treatment areas, since patients are permitted to move around in all areas of the hospital (A. 41).

Similarly, Dr. Ricketson testified that any "nonprofessional attitude" among hospital employees is upsetting to patients. He stated that patients and their families are disturbed when people who are supposed to be taking care of them seem to have their minds on other things. (A. 57-58.) Dr. Ricketson justified a rule covering all the areas of the hospital to which the public has access by noting the mobility of patients, and the likelihood that an event which disturbs the visiting family will also affect the patient (A. 53-54).

When asked specifically about the impact on medical care if hospital employees were permitted to engage in union solicitation in the presence of patients,

[16] Vice-President Victory testified that he did not consult with any doctors, but only with his superiors and the Hospital's attorney, before promulgating the rule in question. Doctors were consulted about the rule only after charges had been filed with the Board attacking its validity. (A. 72-73.) Moreover, Victory conceded, on cross-examination, that solicitation or distribution in a non-working area would have little effect on patient care (A. 31-32).

Dr. Birmingham stated (A. 40): "I think if the discussion becomes volatile or hostile in any form, I think this very definitely would have the potential for adversely affecting the patients and the patient's families" (see also A. 41-42, 43). However, he added that in his opinion a normal conversation, such as one employee asking another to sign a union card, would not have an adverse effect on patients (A. 45). Similarly, although Dr. Ricketson responded affirmatively to the question whether a patient could be upset by overhearing a heated discussion between two nurses concerning the advantages and disadvantages of having a union and of the possibility of a strike if the Hospital did not meet union demands (A. 56-57), on cross-examination he acknowledged that an ordinary conversation between two employees in the cafeteria—"people sitting there and talking to each other"—would not be disturbing to patients, who would not be concerned about inattention to duty because they would assume that the employees were on a break (A. 62). He distinguished between "a one to one sort of thing" and a "group meeting" or where someone was "giving a speech" (A. 63-64). The doctors had no knowledge of any volatile or violent union solicitation occurring at the Hospital, nor were they aware of any patients who had been adversely affected by union solicitation (A. 44-46, 61, 64-65).[17]

[17] The record shows that union solicitation had taken place, at least on the part of employee French, in public areas of the Hospital, particularly in the cafeteria. In a 10-day period, he had solicited about 200 employees to sign union cards (A. 47, 51, 65-66).

The Board accepted the foregoing testimony, which was uncontradicted, but reasonably concluded that it was not sufficient to establish that a ban on all employee union solicitation in all public areas of the hospital was needed in order to avoid disruption of patient care.[19] The Hospital offered no evidence that union solicitation was inherently disturbing to patients or their families. Rather, the doctors testified that *any* volatile or hostile conversation could be disturbing (A. 41, 43, 57, 59-60). But as the administrative law judge, whose findings were adopted by the Board, pointed out (Pet. App. 75a-76a), there was no basis for believing that the union solicitation here would be conducted in such a manner.[19] Moreover, the Hospital has other rules which prohibit loud or disturbing conversations, which it apparently regards as adequate to prevent other "hostile and volatile" exchanges. No reason was offered why these rules would not be adequate to keep union-related conversations within appropriate bounds. As the Court noted in *Beth Israel*, *supra* (slip op. 18, n.20): "Evidence that [the Hospital] adopted a less

[19] As the Court noted in *Beth Israel*, "it is in the Board, not [the Hospital], that the 1974 amendments vested responsibility for developing [federal national labor relations] policy in the health-care industry. It is not surprising or unnatural that [the Hospital's] assessment of the need for a particular practice might over-compensate its goals, and give too little weight to employee organizational interests" (slip op. 16-17).

[19] Although two of the hundreds of employees solicited by employee French expressed hostility to the Union (Br. in Opp. 6; A. 66-68), these incidents did not create any type of disturbance (A. 72).

restrictive approach to behavior in the [public areas] which would be at least as disquieting to patients as union solicitation further supports the Board's conclusion that the risk of harm to patients is not so great as to justify an unlimited restriction."[20]

Similarly, the Hospital's concern that patients might be disturbed by observing staff devoting their attention to matters other than patient care is equally applicable to any personal conversation on the part of staff. The Hospital, however, has not seen fit to prohibit all such personal contacts by off-duty employees in public areas. The Hospital is entitled to prohibit union solicitation during working time, which it does. The Hospital made no showing that patients are likely to believe that off-duty employees conversing in such areas as the cafeteria, lobbies, or gift shop are actually on duty and therefore would be concerned that those staff members are neglecting patients' needs to pursue personal matters.

C. The Alternative Areas In The Hospital Were Not Adequate For The Effective Exercise Of The Employees' Organizational Rights

In *Beth Israel*, the Court indicated that, "[w]hile outside of the health care context, the availability of

[20] Dr. Ricketson appeared to be concerned about groups congregating to discuss union matters or to hear a speech, rather than "one-to-one" encounters (A. 63-64). Clearly the Hospital could prohibit such group activity without resorting to a complete ban on union solicitation. As the court of appeals stated in regard to solicitation in the parking lot, "[o]ther rules not in issue here provide the means for preventing noisy mass meetings and littering of the premises" (Pet. App. 11a).

alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry, * * * it may be that the importance of the employer's interest here demands use of a more finely calibrated scale. For example, the availability of one part of a health-care facility for organizational activity might be regarded as a factor required to be considered in evaluating the permissibility of restrictions in other areas of the same facility" (slip op. 20-21). Usually, the question of alternative areas is not considered until the employer has sustained its burden of establishing that the conduct of employee union solicitation is likely to disrupt its operations, and, as shown, the Hospital has not done so here. "The place of work is a place uniquely appropriate for [the] dissemination of views concerning the bargaining representative * * *." *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325 (1974). The restriction of the employees' Section 7 activity to certain areas of the work place necessarily curtails that activity. Curtailment of a Section 7 right, no less than total abrogation thereof, interferes with and restrain its exercise and thus would be barred by Section 8(a)(1) of the Act unless justified by a compelling management interest,[21] *i.e.*, a showing that the conduct of

[21] With respect to employees " 'already rightfully on the employer's property,' " it is the " 'employer's management interests rather than [its] property interests' that primarily are implicated." *Eastex, Inc.* v. *NLRB*, No. 77-453 (June 22, 1978), slip op. 15, quoting from *Hudgens* v. *NLRB*, 424 U.S. 507, 521-522 n.10 (1976).

solicitation would be likely to interfere with the employer's operations.

However, even if alternatives must be considered when hospitals are involved, the alternatives to use of the Hospital's public areas were not adequate for the effective exercise of the employees' organizational rights. Thus, while there are two employee lounges where the Hospital permits employee solicitation, they are not easily accessible to most of the 1,800 employees. One is located in the laundry building, some distance from the rest of the Hospital, and it is not readily available to most employees during short relief periods. While open to the entire workforce, the other lounge is small and is used primarily by the employees working in the adjacent surgery area of the Hospital. (See pages 7-8, *supra*.) Although solicitation is permitted during non-working time in the Hospital's numerous nurses' stations and adjacent utility rooms, the record shows, that relatively few employees use these areas for their relief periods (A. 49, 51, 71). Unlike such "natural gathering areas" for the employees as the cafeteria, these locations are not "conducive" to solicitation; they are basically work areas for the employees found there.[22]

In sum, the Board reasonably concluded that the Hospital's rule barring employee solicitation in all public areas of the institution unduly interfered with

[22] Compare the finding in *Beth Israel* that the only areas available to employees for union solicitation and distribution were a few "separate and scattered locker areas" to many of which "only a fraction [of the employees] have access" (slip op. 5).

the employees' Section 7 organizational rights absent a showing by the Hospital that such a broad ban was necessary to avoid a disruption of patient care, and substantial evidence supports its finding that the Hospital did not sustain that burden.[23] Accordingly, the court of appeals erred in declining to enforce the Board's order. See *Beth Israel*, *supra* (slip op. 17).[24]

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[23] The Board's decision does not preclude the Hospital from issuing a narrower rule which would preclude solicitation in *some* public areas that are not immediate patient care areas provided it can demonstrate that solicitation there would be likely to affect patient care. Cf. *NLRB* v. *Baylor University Medical Center*, No. 78-80 (Oct. 30, 1978).

[24] To the extent that the decision below was based on the court's perception that the 1974 health-care amendments expressed a congressional concern for preventing disruption in hospitals caused by union activity, "not limited to * * * [that] caused by strikes and picketing" (Pet. App. 9a), it is directly contrary to *Beth Israel*. In that case, the Court found it "significant that * * * Congress *did not* enact any special provision regarding solicitation and distribution in particular or disruption of patient care in general other than through strikes," and inferred, therefore, that "Congress was satisfied to rely on the Board to continue to exercise the responsibility to strike the appropriate balance between the interests of hospital employees, patients and employers" (slip op. 12-13, emphasis added).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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